SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
No.: 500-17-048861-093

DATE: 20 JANUARY 2017

PRESIDING: THE HONOURABLE CHANTAL MASSE, J.S.C.

STÉPHANE DESCHENEAUX
and
SUSAN YANTHA
and
TAMMY YANTHA
Plaintiffs
v.

LE PROCUREUR GÉNÉRAL DU CANADA
Defendant
and
CHIEF RICK O'BOMSAWI N, NICOLE O'BOMSAWI N, CLÉMENT SADOQUES, ALAIN O'BOMSAWIN AND JACQUES THÉRIAULT WATSO, on their own behalf and in their capacity as the elected council representing the ABENAKI OF ODANAK
and
CHIEF RAYMOND BERNARD, CHRISTIAN TROTTIER, KEVEN BERNARD, LUCIEN MILLETTE AND NAYAN BERNARD, on their own behalf and in their capacity as the elected council representing the ABENAKI OF WÔLINAK
Intervenors

JUDGMENT

JM 2158

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[1] The Attorney General of Canada (the "AGC") is seeking the extension until August 3, 2017, of the effective date of the declaration granted in a judgment rendered on August 3, 2015, which declared certain provisions of the *Indian Act*[1] ("the Act") inoperative with respect to registration as an Indian. In the alternative, the Attorney General's relief sought would allow for the possibility that the Court determine any other period it deems appropriate.

[2] Without being able to describe all of the nuances and details of the decision rendered on August 3, 2015, which is 247 paragraphs long, it is important to describe the gist of it.

[3] In its decision, the Court concluded that the plaintiff Descheneaux was the victim of discrimination based on sex, since he did not have a status as advantageous in respect of his right to registration as others in the same situation as him with respect to ancestry, other than the sex of their Indian grandparents, namely, a man instead of a woman. The decision also noted that with respect to the right to registration, the Act is discriminatory in its treatment of the plaintiff Susan Yantha because she is the illegitimate daughter of an Indian man, as compared to certain illegitimate sons, as well as in its treatment of her daughter Tammy Yantha, as a result of the sex of her Indian parent born out of wedlock. These violations of the right to equality were held not to be justified and, as a result, the provisions of the Act that caused the discrimination were declared inoperative and unconstitutional due to their violation of the right to equality provided for in s. 15 of the *Canadian Charter of Rights and Freedoms*.[2]

[4] The relevant orders made in the judgment of August 3, 2015, are as follows:

> [245] DECLARES that paragraphs 6(1)(*a*),(*c*) and (f) and subsection 6(2) of the *Indian Act* unjustifiably infringe section 15 of the *Canadian Charter of Rights and Freedoms* and are inoperative;
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> [246] SUSPENDS this declaration of invalidity for a period of eighteen months;

[5] The elements specifically considered by the undersigned when I decided to suspend for 18 months the effect of the declaration that the provisions of the Act are inoperative are set out at paragraphs 232 and 233 of the judgment and were relied upon notwithstanding the conclusions as to the complexity of the Act, particularly at paragraphs 226 and 227:

> [226] Although the Court considers it highly unlikely that Parliament will choose to cancel the benefits conferred on persons to whom the Double Mother Rule applied, the lawmakers must nevertheless have sufficient room to maneuver when drafting the details of the provisions to remedy the discrimination.

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[1] R.S.C. 1985, c. 15.
[2] Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

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> [227] Indeed, it is in a better position than the Court to determine what these details should be and how consistent they are with the new regime in place, especially given the highly technical and complex nature of the Act. For example, there must be a connection between what is stated in this judgment and sections 8 and following of the Act with regard to Band Lists and the membership rules that may be established by a Band that has assumed control of its List, as was the case when paragraph 6(1)(c.1) was added in 2010.
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> [...]
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> [232] A year and a half to decide which measures to take seems reasonable, in light of the current pre-election context and the fact that this is not the first time that Parliament has been asked to analyze the issue and that consultations on this subject are planned. It should be reiterated that the situation has persisted for a little more than 30 years now without a complete solution. And the Court is not taking into consideration discussions on the discrimination arising from the 1951 Act, which took place long before there were even plans for the enactment of the *Canadian Charter*.[60] The time period takes into account the fact that the issues raised here have been known for several years. Although new consultations are in the works, they must take place promptly.
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> [233] In determining this suspension, the Court is well aware that the plaintiffs and other persons in their situation will continue to suffer discrimination during the eighteen-month period granted, unless Parliament acts more quickly. This is nevertheless the price that must be paid to respect the fundamental role of the legislative power in our society, a role that the Court cannot usurp.
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> 60. In her additional reasons on the remedy, the trial judge refers to discussions on this subject in the early 1970s: *McIvor v. The Registrar, Indian and Northern Affairs Canada*, *supra* note 8.
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> (Citations omitted, other than note 60.)

[6] Finally, the Court suggested that a broader approach should be envisaged by Parliament than the one favoured after the decision of the British Columbia Court of Appeal ("BCCA") in *McIvor* v. *Canada (Registrar of Indian and Northern Affairs)* ("*McIvor"*), [3] even while quickly taking sufficiently broad remedial measures to cure the discrimination identified in the judgment, discrimination that flows from the advantageous treatment given to a group identified in the *McIvor* case. At paragraphs 3 to 5, 8 to 10, 46, 47, 223 and 234 to 243, the judgment explains in more detail why the Court allowed itself to make this suggestion:

> [3] [...] [T]he judgment of the BCCA in *McIvor*, which the Supreme Court of Canada refused to hear in appeal, gave rise to a legislative amendment in 2010. The purpose of

[3] 2009 BCCA 153.

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the 2010 Act was to respond to that judgment by correcting sex discrimination arising from certain transitional provisions of the 1985 Act.

[4] In that case, the BCCA found that the discriminatory treatment was justified because it existed to preserve rights that were vested under the former legislation.

[5] The unjustified discrimination identified by the BCCA in *McIvor* arose from an additional benefit conferred by the 1985 Act on a particular group, not from a vested right. Parliament could have chosen to identify the persons suffering from discrimination on the basis of a prohibited ground in comparison to this advantaged group and try to remedy this discrimination. Instead, however, it chose to restrict the remedy solely to the parties to the dispute and persons in situations strictly identical to theirs.

[...]

[8] All three of the plaintiffs have met their burdens and proved discriminatory infringement of their equality rights. The discriminatory treatment they have suffered is clear from a comparison with a sub-group that is part of the advantaged group identified by the BCCA in *McIvor*. As in that case, the AGC has failed to demonstrate that these infringements arising from sex discrimination can be justified in a free and democratic society.

[9] Thus, discrimination of the same nature as that which historically prevailed against Indian women and their descendants with respect to their being entered in the Register still exists today, despite Parliament's attempts to eradicate it in 1985 and 2010. In fact, by benefiting a group that was already advantaged under the former statute, the 1985 Act exacerbated the discriminatory treatment of certain persons, including the plaintiffs and other persons in their situation. The 2010 Act did not remedy the situation, at the very least, not fully.

[10] Sex discrimination, though more subtle than before, persists.

[...]

[46] It should be noted that the comments of the BCCA certainly do not exempt Parliament from continuing its efforts to enact a statute free of unjustified discrimination, as it is constitutionally bound to do. On the contrary, the BCCA recognized that many issues required the attention of Parliament.

[47] The 2010 Act, however, did not seek to remedy all potential discrimination arising from the advantageous treatment under the 1985 Act of persons to whom the Double Mother Rule applied before that Act came into force. Instead, Parliament chose measures that applied only to persons who were in situations strictly identical to Grismer's.

[...]

[223] The year now is 2015. The 1985 Act from which the discrimination arises has been in force for a little more than 30 years. The general finding of discrimination in the 2009 judgment of the BCCA in *McIvor* could have enabled Parliament to make more sweeping corrections than what was accomplished by the measures in the 2010 Act. The

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discrimination suffered by the plaintiffs arises from the same source as the one identified in that case.

[...]

[234] This judgment aims to dispose of the plaintiffs' action.

[235] It does not, however, exempt Parliament from taking the appropriate measures to identify and settle all other discriminatory situations that may arise from the issue identified, whether they are based on sex or another prohibited ground, in accordance with its constitutional obligation to ensure that the laws respect the rights enshrined in the *Canadian Charter*.

[236] This task incumbent on Parliament is complex and commensurate with the general impact of the statutes it enacts. It must take into account the effects of a statute in all the situations to which it will likely apply, and do so in light of the reports, studies and factual situations discussed and raised during the enactment process, and in light of the applicable law, including the principles set out in judicial decisions.

[237] Judges hear only one specific dispute and are privy only to what is adduced and argued before them. They are not in the best position to grasp all of the implications of the laws and their potentially discriminatory effects.

[238] In the 2010 Act, Parliament chose to limit the remedy to the parties in *McIvor* and those in situations strictly identical to theirs. It did not attempt to identify the full measure of the advantages given the privileged group identified in that case.

[239] When Parliament chooses not to consider the broader implications of judicial decisions by limiting their scope to the bare minimum, a certain abdication of legislative power in favour of the judiciary will likely take place. In such cases, it appears that the holders of legislative power prefer to wait for the courts to rule on a case-by-case basis before acting, and for their judgments to gradually force statutory amendments to finally bring them in line with the Constitution.

[240] From the perspective of Canadian citizens, all of whom are potential litigants, the failure to perform this legislative duty and the abdication of power that may result are obviously not desirable.

[241] First, it would compel them to argue their constitutional rights in the judicial arena in many closely related cases and at great cost, instead of benefiting from the broader effects of a policy decision and counting on those who exercise legislative power to ensure that their rights are respected when statutes concerning them are enacted and revised. What is more, limited judicial resources used on disputes that a well-interpreted prior judgment should have settled are squandered instead of being used efficiently, with unfortunate effects for all litigants.

[242] It is clear that, because of the technical nature of the Act, its evolution over time, and its multi-generational effects, the task of ensuring that it has no unjustifiable discriminatory effects is a significant challenge. These are not, however, reasons that justify not taking on that challenge once again.

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> [243] Parliament should not interpret this judgment as strictly as it did the BCCA's judgment in *McIvor*. If it wishes to fully play its role instead of giving free reign to legal disputes, it must act differently this time, while also quickly making sufficiently significant corrections to remedy the discrimination identified in this case. One approach does not exclude the other.
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> [244] Given the plaintiffs' constitutional right to equality, paragraphs 6(1)(a), (c) and (f) and subsection 6(2) of the Act must be declared inoperative. The effect of this judgment will be suspended, however, for a period of eighteen months.

[7] In its application for an extension, the AGC relied on several arguments that had already been considered by the undersigned when I decided on the exceptional period of 18 months during which the effect of the declaration of inoperability of the provisions of the Act would be suspended, in particular, the election, the consultations that would be necessary, as well as the complex and technical nature of the Act.

[8] The AGC produced several affidavits and exhibits describing an approach in two steps, which the government has chosen.

[9] As a first step, it favours adopting amendments to the Act that address known discrimination based on sex. The discrimination based on sex identified in the judgment, as well as other similar situations identified by the government or raised during the consultations or meetings could be the subject of remedial measures. A bill to this effect is currently under study, namely, Bill S-3 entitled *An Act to amend the Indian Act (elimination of sex-based inequities in registration)*,[4] and it has been the subject of consultations or information sessions.[5]

[10] Secondly, the government "committed to launching a collaborative process with First Nations and other Indigenous groups to address broader issues relating to Indian registration, Band membership and citizenship with a view to future reform."[6] According to the action plan produced as Exhibit R- 15, the issues relating to discrimination based on prohibited grounds other than sex will be addressed in this second step.

[11] The application for an extension followed, in particular, a letter from the Standing Senate Committee on Aboriginal Peoples dated December 13, 2016, indicating that the committee had "heard evidence to suggest that gender-based discrimination would persist even if this bill were passed,"[7] as well as "evidence that the Crown may have failed to fulfill its duty to consult under s.35 of the Constitution Act, 1982."[8] The Committee specifically asked for an application to be made to the Québec Superior Court for an extension to "allow the department to continue their consultation process

[4] Exhibit R-6.
[5] The Court is obviously not in a position to characterize the exact nature of the consultations or meetings and this judgment should not be interpreted to have taken any position in this regard.
[6] Exhibit R-15, p. 1.
[7] Exhibit R-11, p. 1.
[8] Id.

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on the issue of gender-based discrimination in registration."[9]

[12] The action plan in Exhibit R-15 describes the possibility of holding continuing discussions on the proposed amendments to Bill S-3 in order to address residual sex-based inequities related to the right to registration as an Indian. Thus, according to the action plan, "a six-month extension would allow the Government to further engage on Bill S-3 to confirm that the proposed amendments provide the appropriate remedy for situations found in *Descheneaux* and to ensure that the Bill addresses other known situations of sex-based inequities."[10]

[13] The evidence produced also describes the parliamentary process while underlining the impossibility of predicting precisely the time required for the process. The House will adjourn for the summer on June 23, 2017, subject to any changes, and the Senate will do the same on June 30, 2017, also subject to any changes.

[14] According to the action plan, which is Exhibit -15, the time requested includes "the time required to draft any additional amendments as well as to complete the legislative process, beginning in early spring 2017, to pass Bill S-3 into law by the end of the parliamentary session on June 23, 2017 and have an order-in-council passed immediately following for the coming into force of the bill."[11]

[15] Through their lawyer who also represented the plaintiffs, the Chiefs of the Abenaki of Odanak and of the Abenaki of Wôlinak, intervenors in this case, criticized the government's position that limited to discrimination based on sex, the situations that could be considered under Bill S-3 and could be the subject of remedial measures.

[16] They stated they had identified situations they maintain are discrimination based on other prohibited grounds and, more particularly, family status. They also maintain that situations ruled to be discriminatory but justified on the basis of preserving acquired rights in the *McIvor* case should be the subject of discussions. They also maintain that they will immediately turn to the courts if Bill S-3 is adopted in its current form.

[17] Exhibit I-7, a letter from the Chief of the Abenaki of Odanak addressed to the Department of Indian and Northern Affairs Canada dated January 19, 2017, reads as follows:

> INTRODUCTION
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> This is further to your email of January 16, 2017, concerning Bill S-3, and to the "Action Plan" forwarded to our lawyers by counsel for the Government of Canada in the Descheneaux litigation.
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> Your email requested my "views on hosting a community engagement session for interested individuals from Odanak," for "impacted individuals to share their views on

[9] Id.
[10] Exhibit R-15, p. 3.
[11] Id.

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how to address systemic issues in Indian registration, and provide [them] with an opportunity to consider various perspectives and to determine whether Bill S-3 addresses ail known sex-based inequities in registration."

The view of my council, as well as that of the Grand Conseil de la Nation Waban-aki tribal council, which I chair, is that such a meeting would be a poor use of my community's time and resources. However, if you wish to organize your own meeting in Odanak, then Council or another community organization could rent the required facilities to your Department for a reasonable fee. This is an administrative matter about which you could call my Council office.

I will briefly set out the problems with your proposal, before recalling the Abenaki position on the steps required to improve Bill S-3 and our own suggestion on how to do so quickly and efficiently.

Problems with INAC's proposed approach

The first problem in your proposal is that it refers to "a community engagement session." If by "engagement" you mean the same as the process your Department has imposed up till now, then it is clear to us that would not be consultation, which we assume if why you refrain from using that term. However, the Senate Committee on Aboriginal Peoples directed you to "consult with Indigenous organizations." It will be up to you to explain to the Senate why you chose not to follow its clear instructions.

The second and more practical problem we have with your proposal is that we are not confident you would be able to provide any meaningful response after hearing from affected individuals, if they shared their views on "known sex-based inequities in registration."

The clear inequity that we are aware of consists of the differential treatment of those descended from a woman who lost status due to marriage to a non-Indian man if they were born before September 4, 1951, compared to those in the same situation but who are descended from a man who married a non-Indian woman and gave her status. The British Columbia Court of Appeal held in McIvor that this discrimination violated the equality right guaranteed by the Canadian Charter of Rights and Freedoms, but that the violation was justified on the grounds of acquired rights. Your Assistant Deputy Minister told us and the Senate committee that your Department remains satisfied with that conclusion.

Unless your Department is willing to reconsider its position on this point, you are effectively asking our members to describe discrimination about which you plan to do nothing. If there are other sex-based inequities in the registration rules that your Department has identified, we would be surprised that you did not address them already in Bill S-3, but we would obviously be interested in reviewing them.

Finally, the fundamental problem we have with your proposal is that you wish to limit your "engagement" to determining "whether Bill S-3 addresses all known sex-based inequities in registration."

We made our position clear when the Québec chiefs met with you in September, when you and I spoke by phone in October, when we appeared before the House of Commons

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and Senate committees in November and when we met with your Assistant Deputy Minister in December: we want to address at least four specific instances of discrimination based on family status.

As I pointed out to you at the September 9th meeting with the Québec chiefs, Justice Masse wrote that her decision "does not, however, exempt Parliament from taking the appropriate measures to identify and settle all other discriminatory situations that may arise from the issue identified, whether they are based on sex or another prohibited ground, in accordance with its constitutional obligation to ensure that the laws respect the rights enshrined in the *Canadian Charter."*

At that meeting, you personally told me in front of the other chiefs that you would be open to discussing other instances of discrimination. We heard nothing further from you until the following month, when you asked me and my council to speak to you by conference call and told us that Bill S-3 was tabled and that only sex-based discrimination would be addressed. I hope you understand that this experience has affected our willingness to devote our time and energy to the processes that your Department puts forward.

Steps required to improve Bill S-3

The Action Plan your Department has sent to our lawyers states that Bill S-3 will not address distinctions in Indian registration based on family status because of *"Canada's* commitment to reconciliation and a renewed nation-to-nation relationship with Indigenous Peoples." Obviously, we look forward to a nation- to-nation relationship between the Abenaki and the Government of Canada, but that future goal is not an acceptable reason for tolerating unconstitutional discrimination against our members in the present.

As I told your Assistant Deputy Minister at our December 1st meeting, the issue is your Department's status rules under the *Indian Act*, which is a separate matter from our community's power to determine who its members are, as we do already. You created these status rules and are now amending them: you therefore must ensure that they do not violate our members' right to equality under the *Charter.*

We believe that your Department should take advantage of any extension given to the government by the Court and meet Justice Masse's challenge to address all other discriminatory situations that may arise under the registration rules, including those based on grounds other than gender.

Justice Masse's judgment clearly explains why our approach is preferable: leaving other forms of discrimination untouched would compel litigants "to argue their constitutional rights in the judicial arena in many closely related cases and at great cost, instead of benefiting from the broader effects of a policy decision and counting on those who exercise legislative power to ensure that their rights are respected when statutes concerning them are enacted and revised. What is more, limited judicial resources used on disputes that a well-interpreted prior judgment should have settled are squandered instead of being used efficiently, with unfortunate effects for all litigants."

During our conference call in October, I told you that if other *Charter* issues were not addressed, the Abenaki would have to be back in court with your Department as soon as

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> the bill was passed. It was disturbing to me that your only answer was that that is my prerogative. In effect, you were telling me that the Department is content to see my community's resources, along with those of the court and the government, be squandered on litigation closely related to the Descheneaux case.
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> **We are suggesting a better way. We suggest that your Department's lawyers and ours meet as soon as possible with representatives of other affected organizations, such as the Assembly of First Nations, the Native Women's Association of Canada, and the Indigenous Bar Association, in order to review issues of continuing unconstitutional discrimination in your Indian Act registration rules.**
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> **Obviously, the scope of such a discussion would be narrower than the ambitious goals set out for your Department's proposed "Stage II" to its response to the *Descheneaux* judgment, but broader than your narrow focus in bill S-3. The goal would be to identify the scenarios likely to be ruled unconstitutional by the courts and the amendments needed to correct the problems immediately. We are confident that both Senators and Members of Parliament would welcome the results of such an approach since it would avoid further litigation, as the Court suggested.**
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> We are prepared to make ourselves and our team available for such a process rapidly and in ample time to meet any new deadline set by the Court. We look forward to your positive response.
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> (Bold emphasis added; underlining in the original.)

[18] In an article published in 2002, Professor Kent Roach made the following comments that are worth recalling in relation to the particular complexity attached to broad and inclusive discussions concerning First Nations, such as those envisaged here, and that were attempted after the decision of the Supreme Court of Canada in 1999 in *Corbiere v. Canada (Minister of Indian and Northern Affairs Canada)*:[12]

> 55. The second phase was intended to start in early 2001 and deal with "integrated and sustainable electoral reform to establish a system that is both consistent with the Canadian Charter of Rights and Freedoms, and respects the interests of all Band members, whether they live on or off reserve." In addition, "consideration will be given to broader discussions on Indian Act governance, accountability and authorities in the Stage Two consultation process." This second phase appears to have been caught up in ongoing controversy over reforms to the Indian Act. It does. however. appear to be connected with the broader band governance issues implicated by the Court's ruling. It is significant. however. that this more comprehensive approach will take longer than even the longest period of delay sanctioned by the Court in Corbiere. Even the most generous periods of delay allowed by the Court may be too short for genuine structural reform to occur.
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> 56. Even the more limited first stage process was not without controversy. Shortly after the Minister of Indian Affairs announced the two-stage process on December 9, 1999,

[12] [1999] 2 S.C.R. 203.

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then Assembly of First Nations (AFN) National Chief, Phil Fontaine, complained that the federal announcement:

> took 7 months out of what is already a tight time-frame to implement a national decision with far-reaching implications. This is unfortunate, given the AFN presented an action plan less than a month after the decision came down. After this long delay, we see the resources are minimal both in terms of time and funding.

57. In a letter of September 25, 2000, to all First Nations, present National Chief Mathew Coon Come objected that First Nations, "have not been given sufficient time to assess the impacts of the regulations and respond to them. It also appears that First Nations will not be properly funded to analyse the impacts or administer the regulations. In fact, concerns have been raised that First Nations could be forced to defend themselves against law suits arising from their inability to meet the obligations imposed by the regulations." The AFN also attempted to intervene to support a request by an intervenor in Corbiere, the Lesser Slave Lake Regional Council, to request a rehearing to extend the 18 month period of delay, a request that was denied by the Court on November 11, 2000, without written reasons. Although there was some consultation with the affected groups. it is not clear whether the consultation process, which led to the enactment of regulations allowing off-reserve residents to vote in band elections and referenda, was entirely successful in taking into account the complex views and sometimes conflicting interests of those affected by Corbiere, including the off- reserve residents that the decision was intended to benefit. For example, the options of mail-in ballots or voting on reserve may not be effective for transient off-reserve Band members living in cities. A more creative response would have involved polling stations for multiple bands at Aboriginal friendship and other cultural centres located in cities where many band members live.[13]

(Underlining added.)

[19] The intervenors' scepticism about postponing certain issues until Phase II, according to their lawyers' submissions, is also based on the absence of concrete follow-up to the decision in the *McIvor* case in 2009 in order to correct other situations described at that time, until the Court ruled in this case, which had been mentioned in one of the BCCA's decisions in 2010 concering the extension of the suspension of the declaration of invalidity,[14].

[20] The action plan in Exhibit R-15 describes a period of at least 24 months to complete the second phase. The intervenors' attorney questions whether this is realistic.

[21] The attorney for the plaintiffs and the intervenors however confirmed that his clients, though in disagreement with the government's approach, believe that the AGC's motion must be granted in order to allow for further discussions they hope will bear fruit, even though they do not have too much faith in them. They are above all concerned,

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[13] Kent Roach, *Constitutional Remedies in Canada*, 2nd Edition, Canada Law Book, paragraphs 55 and 56.

[14] *Mc Ivor v. Canada (Registrar of Indian and Northern Affairs)*, 2010 BCCA 338.

which is entirely to their credit, about the potential impacts of a failure to grant an extension on other individuals' right to registration. The plaintiffs have also not sought a particular remedy that would apply only to them.

[22] The attorney for the AGC, for her part, argues that the action plan in Exhibit R-15, even though it has been approved, is not final and could still be adapted based on the comments received.[15] She also confirmed openness to holding a meeting between lawyers, as suggested in the letter produced as Exhibit I-7.

[23] All parties therefore took the view that the provisions of the Act should be kept in force during these discussions and until legislation is adopted with remedial measures.

[24] Determining the nature and scope of the legislative response to the decision rendered is a matter entirely for the government and Parliament. The Court will not allow itself to interfere with their roles and responsibilities. The decision rendered on August 3, 2015, already expresses, in a general manner, the respective roles of the courts and the legislature and what they involve. In this case, the specific role of the Court is strictly to decide on the merits of the application for an extension.

[25] In the case of *Carter* v. *Canada*,[16] the Supreme Court of Canada granted an additional period of four months due to the delay caused by the preceding federal election, thereby increasing from 12 to 16 months the delay during which the suspension order effectively kept in force unconstitutional provisions that prohibited physician−assisted death for competent adult persons who clearly consent to the termination of life and under circumstances where they have a grievous and irremediable medical condition that causes enduring suffering that is intolerable to them.

[26] On that occasion, the Supreme Court emphasized that suspending the effect of a declaration of constitutional invalidity is, to begin with, an extraordinary measure "since its effect is to maintain an unconstitutional law in breach of the constitutional rights of members of Canadian society"[17] and extending such a suspension poses even more problems. According to the Supreme Court, an Attorney General seeking such an extension must show exceptional circumstances, which is a heavy burden.

[27] An election is one such circumstance. However, the Court had already taken this into account, as set out above, as well as the complexity of the Act and the issues related to consulting Aboriginal peoples and other interested parties. All these factors had, from the start and even before the election, led the Court to suspend the declaration of invalidity for 18 months, a period six months longer than the 12-month delay usually granted in similar situations.

[28] The exceptional circumstances that could not be considered at first arise as much from the serious difficulties in determining the exact process to be adopted to determine

[15] This is moreover what is confirmed by the email dated January 17, 2017. See Exhibit I-8.
[16] [2016] 1 S.C.R. 13.
[17] Id., para. 2.

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remedial measures and their sufficiency, as from the difficulties in identifying all the situations that the government and Parliament wish to consider for the purposes of adopting immediate remedial measures. It is clear, no matter what result the interested parties arrive at, that an additional delay is necessary under the circumstances.

[29] The fact that the parties agree to the extension is an element that is part of the equation, but not one that is given considerable weight, considering that the equality rights of numerous individuals who are not parties are being suspended.[18]

[30] What must also be considered, however, in the general interest, are the effects once a declaration of invalidity comes into effect. Numerous individuals will be deprived of their right to registration, without any resulting benefit for those who are victims of discrimination. Everyone will be treated equally but everyone will be without the right to registration.

[31] What cannot be ignored are the impacts[19] that could be felt by all those who currently have the right to be registered as Indians but are not yet registered or who will have the right as of birth, especially newborns to whom paragraph 6(2) of the Act is likely to apply and whose parents live on reserve. If the declaration that the provisions are inoperative took effect, these individuals would be likely to suffer the consequences, such as being deprived of the non-insured health benefits program, as would the communities to whom they belong, which are financed by the government on the basis of the number of registered individuals living on the reserves – and all this, without any benefit to the plaintiffs or others in their situation, as previously mentioned.

[32] While some of those who are victims of this discrimination currently live on reserve, it can be asserted, without much fear of error, that this is not the case for a very large majority of them.[20]

[33] Moreover, as a result of the additional delay granted, depending on the option ultimately chosen, amendments to Bill S-3 or its realignment to give it a broader scope could recognize the equality rights of more individuals, in the short term and without their being obliged to resort to litigation.

[34] Taking into account all of the circumstances, the AGC has discharged its burden and the extension of the suspension of the effect of the declaration that sub-paragraphs 6(1)(a), (c) and (f), as well as paragraph 6(2) of the Act are inoperative is granted, but only until July 3, 2017.

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[18] The Department of Indian and Northern Affairs Canada indicates that, based on preliminary demographic projections, between 28,000 and 35,000 more individuals would become eligible for registration as Indians by virtue of Bill S-3 in its current form. See in particular Exhibit R-6, at page 17 of 32.

[19] See the affidavit of Nathalie Nepton of December 22, 2016, concerning the impacts at issue and, in particular, paragraph13 describing, among other things, the non-insured health benefits program.

[20] In the case of *Corbiere v. Canada (Minister of Indian and Northern Affairs Canada)*, *supra* note 12, the Supreme Court of Canada noted that individuals who were victims of discrimination could be separated from First Nations and reserves precisely as a result of this discrimination.

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[35] This brings the total period that Parliament will have had to 23 months, 19 months excluding the four months it stood adjourned during the election. The July 3rd date was chosen based on the end of parliamentary business for the House of Commons, which will be on June 23, 2017, subject to any changes, and it includes a delay of a few days, in case the legislative response is adopted at the last minute, to allow for an order-in-council to be adopted. It goes without saying that nothing would prohibit proceeding more quickly.

FOR THESE REASONS, THE COURT:

[36] **GRANTS** the application made in the alternative;

[37] **EXTENDS** until July 3, 2017, the suspension of the effect of the declaration in the judgment of August 3, 2015, that sub-paragraphs 6(1)(a), (c) and (f) and paragraph 6(2) of the *Indian Act* are inoperative*;*

[38] **WITHOUT COSTS.**

CHANTAL MASSE, J.S.C.

Maître David Schulze
Dionne Schulze
Attorney for the Plaintiff and the Intervenors

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Maître Nancy Bonsaint
Department of Justice Canada
Attorney for the Defendant

Hearing dates: January 6 and 20, 2017

unapproved